No. 78-5

Supreme Court, U.S.
FILED
SEP 26 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

JAYS FOODS, INC. and NIELSEN BROTHERS CARTAGE CO., INC., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 573 F. 2d 438. The decision and order of the National Labor Relations Board (Pet. App. 36a-90a) are reported at 228 N.L.R.B. 423.

JURISDICTION

The judgment of the court of appeals (Pet. App. 32a-35a) was entered on May 23, 1978. The petition for a writ of certiorari was filed on July 3, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's findings that petitioner Jays Foods, Inc., threatened employees, subcontracted out its delivery operations, and discharged employees, all because of their union activities.

2. Whether the Board's remedial order, as modified by the court of appeals, is reasonable and proper.

STATEMENT

1. Petitioner Jays Foods, Inc. ("Jays") produces and packages snack foods at its Chicago, Illinois, plant. For more than 30 years, Jays used its own truckdrivers and tractor-trailers to deliver its products to distribution centers in the Chicago area and to independent distributors located in four states (Pet. App. 44a-45a).

At the end of June 1975, claiming temporary financial difficulties, Jays obtained the truckdrivers' agreement to a six-month postponement of the wage increase due them on July 1. Some of the truckdrivers subsequently became concerned about the deferral and contacted representatives of Local 705 of the International Brotherhood of Teamsters. Six of the truckdrivers met with Teamsters representatives on September 26, 1975, signed authorization cards, and scheduled a meeting on October 4 between the Teamsters and as many of the other 26 truckdrivers as the six could convince to attend. During the following week, the six truckdrivers tried to persuade their co-workers to attend the meeting (Pet. App. 5a, 51a-52a).

On the day before the scheduled meeting, the president of Jays asked two employees if they intended to attend the union meeting scheduled for the next day and threatened to "close the doors" if the employees signed union

authorization cards (Pet. App. 55a). That same evening, the company vice-president assembled the drivers for a special meeting to announce the immediate granting of the deferred wage increase. At the same time, he said that he had heard that "a few [of the] fellows have contacted a union" and he stated that he would withhold the wage increase from the ringleaders of the union drive if he could identify them (Pet. App. 5a, 53a-55a). During the following days, a company supervisor repeatedly asked various truckdrivers if they had contacted the union. Both the supervisor and an assistant sales manager warned that continued union activity would lead the company president to "sell the trucks," *i.e.*, to contract out the tractor-trailer delivery work (Pet. App. 6a, 57a-60a).

Shortly thereafter, Jays carried out the threats to dispose of the trucking operations. On October 9, the Company agreed to sell its trucks and subcontract its delivery operations to petitioner Nielsen Brothers Cartage Co., Inc. ("Nielsen"). A month later, three days before the agreement became effective, Jays discharged all its truckdrivers (Pet. App. 63a, 70a). Nielsen immediately hired 15 of Jays' 26 truckdrivers. At that time, however, Nielsen did not hire most of the leading union proponents, even though almost all of them were among the more senior drivers at Jays. Nielsen later hired eight of the remaining 11 former Jays drivers (Pet. App. 6a-7a).

The decision to transfer the trucking operations was made after only a superficial cost comparison based on Nielsen's estimated charges for just one week's trucking operations. Jays' officials admitted that at the time of the decision to subcontract they were uncertain as to how great a savings would result from the new arrangement

(A. 920, 1049).[1] They also testified that they were concerned about having to pay union scale and becoming involved in expensive, time-consuming litigation with the Teamsters (Pet. App. 66a-67a). Jays had previously refused numerous offers to handle its delivery business from established cartage firms in the Chicago area. Only a few months earlier, the Company had rejected an offer from Nielsen. And even at the time when the company was claiming that financial problems required deferral of the drivers' wage increase, it refrained from contacting any of the interested cartage firms (Pet. App. 60a-61a).

Jays also employs driver-salesmen who deliver its goods in assigned territories from the branches to the individual retail stores (Pet. App. 45a). Edward Olson, who had been a salesman at Jays' West Branch for more than 20 years, contacted representatives of the Retail Clerks Union in the spring of 1975 about organizing the company's salesmen. He openly distributed authorization cards at the West Branch where he worked, obtaining signatures from a majority of his co-workers. He organized a union meeting, discussed the meeting with many of his fellow salesmen, and served as the union observer at the West Branch during the October 2 Board-conducted representation election, which the union lost. Shortly after the election, the company vice-president directed the assistant branch manager to "follow Olson [on his route] because he was prounion" (Pet. App. 73a, 74a, 81a).

On December 1, 1975, Olson was discharged without warning. Jays stated that he was fired because he failed to

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[1] "A" refers to the joint appendix filed in the court of appeals.

deliver products to two of his accounts on the Friday after Thanksgiving and because his sales volume was low (Pet. App. 78a).

2. Charges were filed with the National Labor Relations Board alleging, *inter alia,* that petitioners had violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), 158(a)(3), by threatening employees with loss of benefits and jobs because of their union activities, by selling the trucks and discharging its 26 truckdrivers, by discharging Olson because of his union activities (Pet. App. 43a). After a hearing, the administrative law judge held that Jays had violated the Act by ceasing its delivery operations, selling its trucks, and contracting out its delivery operations to Nielsen; by discharging the 26 truckdrivers because of employee union activities; by threatening to sell its trucks and close its doors because of the employees' union activities; and by discharging Olson because of his union activities.

The administrative law judge concluded that the contracting out was motivated by anti-union animus rather than legitimate business considerations. The judge found particularly compelling the evidence that the company had not seriously considered subcontracting its delivery operation until after the inception of union activity among the drivers (Pet. App. 63a, 70a). Pointing to the threats made to the drivers and the company's own testimony that the prospect of unionization was a factor in the decision to shut down the delivery operation, the judge explained (Pet. App. 70a):

> I have no doubt that some dollar savings may be realized by [Jays]. I do not believe, however, that Jays would have departed from 35 years of highly successful business practices, abandoning its

complete control over a complex delivery system, involving speedy, dependable delivery of fragile, perishable products which require special handling by experienced personnel, but for the advent of the drivers' effort to bring the Teamsters into the operation.

With respect to Olson's discharge, the administrative law judge noted that Olson had never missed deliveries in the past and that another salesman who missed a Friday delivery was neither criticized nor disciplined by Jays (Pet. App. 82a, 76a and n. 32). He further found that while Olson's dollar volume of sales was consistently low, it was not consistently the lowest in the branch, as alleged by Jays. Moreover, the various routes differed substantially in size and sales potential; there was no showing that Olson failed to realize his route's potential; and Olson's successor also ranked very low in weekly sales volume (Pet. App. 79a-80a). The judge added that in spite of Olson's relatively poor performance "there is no evidence that Olson was in any danger of losing his job prior to his activities on behalf of the Union and his serving as one of the observers at the election on October 2" (Pet. App. 82a).

As a remedy, the administrative law judge recommended that Jays be required to offer Olson reinstatement to his former job or a substantially equivalent job with back pay and other benefits. The judge also recommended that Jays be ordered to cease and desist from various violations of Section 8(a)(1) and 8(a)(3) of the National Labor Relations Act and that it make the dismissed truckdrivers whole from the time of their discharge until they secured substantially equivalent employment (Pet. App. 84a-89a). The judge did not recommend that Jays be ordered to resume its delivery operation and reinstate the truckdrivers, as requested by

the general counsel, but he recommended that if Jays resumed the delivery service, the former truckdrivers should be offered reinstatement (Pet. App. 86a).

The Board upheld the findings of the administrative law judge and adopted the remedial provisions he recommended, except that the Board ordered Jays to resume the delivery services that it had contracted out to Nielsen (Pet. App. 36a-37a).

The court of appeals held that the Board's unfair labor practice findings were supported by substantial evidence (Pet. App. 12a). It upheld the Board's decision and enforced its order except for the provision requiring Jays to resume its delivery operation. The court agreed with the administrative law judge that under the circumstances it would be improper to impose that requirement on the parties (Pet. App. 14a). It therefore modified the Board's order to conform to the administrative law judge's recommended order (Pet. App. 13a-15a).[2]

ARGUMENT

1. Petitioners argue that the Board's findings that Jays was motivated by anti-union considerations when it discontinued its distribution operation and discharged Olson are not supported by substantial evidence. In so arguing, petitioners quarrel with the administrative law judge's credibility resolutions (upheld by the Board) and contend that he (and the Board) drew inferences that are not supported by the record. These assertions, which raise

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[2]The court concluded that the Board's order might impose a hardship on Nielsen and on the 23 truckdrivers employed by Nielsen, who were receiving better wages from their new employer (Pet. App. 14a).

purely factual questions, do not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.[3]

In any event, the administrative law judge carefully explained his credibility resolutions (Pet. App. 53a-54a, 56a, 57a n. 10, 58a, 59a n. 13, 62a-63a, 66a-67a, 77a, 81a, 81a-82a), and the court of appeals was plainly correct in refusing to upset the Board's adoption of them. *National Labor Relations Board* v. *Walton Mfg. Co.*, 369 U.S. 404, 408; *National Labor Relations Board* v. *Pittsburgh S.S. Co.*, 337 U.S. 656, 659-660. Moreover, direct evidence of unlawful motive is rarely available, and it is well settled that "the trier of fact may infer motive from the total circumstances provided." *Shattuck Denn Mining Corp.* v. *National Labor Relations Board*, 362 F. 2d 466, 470 (C.A. 9).

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[3]There is no merit to petitioners' contention (Pet. 10-21) that the court of appeals misapplied the *Universal Camera* substantial evidence standard. Contrary to petitioner's claim (Pet. 15-16), neither the Act nor *Universal Camera* require a reviewing court to assess the Board's findings according to the "preponderance of the evidence" standard. Section 10(c) of the Act, 29 U.S.C. 160(c), on which petitioners rely (Pet. 5), requires the *Board* to meet that standard in finding a violation; it does not set the standard for review of the Board's findings. Petitioners further complain, in essence, that the court of appeals should have reviewed the evidence *de novo* (Pet. 18). That type of inquiry was expressly disapproved in *Universal Camera, supra*, 340 U.S. at 488. Petitioners' further assertion (Pet. 12-15) that the courts articulate the substantial evidence standard in various ways merely confirms Justice Frankfurter's observation that "the precise way in which courts interfere with agency findings cannot be imprisoned within any form of words * * *" (340 U.S. at 489).

service two customers on one occasion was sufficiently serious to deny him reinstatement. Clearly it was not. See, *e.g., National Labor Relations Board* v. *Yazoo Valley Electric Power Ass'n*, 405 F. 2d 478, 480 (C.A. 5). The court of appeals detailed the circumstances surrounding Olson's alleged defaults (Pet. App. 4a-5a); those circumstances suggest that both failures to service stores were excusable. In the first instance he attempted to service the store but was prevented from doing so because he arrived 10 to 20 minutes after the store's receiving hours. In the other instance, he was unable to service the store because the store already had a full stock of Jays' products.

As to petitioners' challenge to the portion of the order requiring Jays to offer its former truckdrivers reinstatement should it terminate its arrangement with Nielsen and to make them whole for any losses stemming from their release by Jays (Pet. 67-68), the court of appeals properly concluded that this remedy was necessary to recompense the truckdrivers for the effect of the unfair labor practices committed by Jays. The court modified the Board's order in an effort to avoid imposing possible hardship on Jays, Nielsen, or the truckdrivers. Further modification of the order so as to free Jays from the link with Nielsen or to place an arbitrary time limit on Jays' make-whole obligation would fail to accord adequate protection to the employees discriminated against by Jays.

2. Petitioners' objections to the remedial order similarly raise no issue warranting further review. Petitioners contend that the court of appeals should have denied the Board's order reinstating Olson (Pet. 67). The only issue raised by this contention is whether Olson's failure to

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1978.

DOJ-1978-09